

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JUL 19 1991

ROBERT L. HOECKER
Clerk

ANTHONY JEROME HARRIS,)
)
Plaintiff-Appellant,)
)
v.)
)
RON CHAMPION, Warden; SUSAN)
BRIMMER LOVING*, Attorney General)
for the State of Oklahoma,)
)
Defendants-Appellees.)

No. 90-5223

No. 90-5224

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. Nos. 90-C-448-C & 90-C-475-C)

ORDER GRANTING REHEARING
AND AMENDING PREVIOUS ORDER

Before MCKAY, SEYMOUR, and EBEL, Circuit Judges.

This court entered its opinion in this case on June 17, 1991. On July 1, 1991, appellees Ron Champion, Warden, and Robert H. Henry, the Attorney General for the State of Oklahoma, filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc. The Petition for Rehearing asks that the panel's previous opinion be modified in three particulars. They will be dealt with in turn:

* Since the case was filed, Susan Brimmer Loving has become the Attorney General of the State of Oklahoma, and she is accordingly substituted for Robert H. Henry as an appellee in this case.

First, appellees express concern about the scope of the remedy that may result on remand. However, our opinion does not purport to prejudge for the district court what may be an appropriate remedy, and it is premature now for the appellees to speculate that the district court may issue an inappropriate remedy over parties not before it. The district court is dealing with habeas corpus proceedings, but, as pointed out at pages 15-17 of our opinion, a wide range of remedies is available in habeas corpus actions where a defendant is unconstitutionally deprived of his right to counsel on appeal. Nothing in our opinion suggests that improper relief could, or should, be awarded in this case and we will not presume to the contrary.

It is entirely appropriate that the district court review the operations of the Oklahoma Appellate Public Defender's Office in providing appellate counsel for its indigent criminal defendants. The petitioner in this case has raised serious constitutional concerns about the systemic operations of the State Appellate Public Defender's Office as they relate to his direct criminal appeal before the Oklahoma Court of Criminal Appeals. Certain of petitioner's allegations, such as his equal protection, due process, and exhaustion claims, can not be examined in a vacuum, and they will, of necessity, require the federal district court to examine the general availability of legal assistance for indigent criminal defendants from the Oklahoma Appellate Public Defender's Office. Thus, appellees' petition for rehearing is denied insofar

as it seeks modification of the scope of the hearing or a pre-hearing limitation on the scope of potential relief that may be ordered by the district court.

Second, petitioners ask that we modify our opinion to the extent that we have instructed the district court to request the Oklahoma Appellate Public Defender's Office and the Oklahoma Attorney General's Office to participate in the hearing. The Attorney General for the State of Oklahoma is a party in this action. One of the defendant's sentences is a consecutive sentence which is to be served in the future, and thus he is apparently under the direct jurisdiction of the Attorney General as to that sentence. See Appellee's Petition for Rehearing at page 7. In any event, even if the Attorney General were not a party, her participation as a witness would be of assistance to the court. Although the Oklahoma Appellate Public Defender's Office is not a party, it is appropriate to request the participation of that office in this hearing to testify as a witness in response to the constitutional allegations made by petitioner. In any event, appellees seem to have missed the thrust of our request that they participate in the hearing. Serious constitutional challenges are being made against the way that the State of Oklahoma provides appellate counsel for its indigent criminal defendants. One would think that the Attorney General's Office would want to be represented at a hearing where such matters are under review. It is the intention of this court that the district court probe fully the extent of the petitioner's allegations. In the interest of comity as well as in the interest

of providing an adequate review of appellant's allegations, the views of the State of Oklahoma should be solicited as broadly as possible. Thus, appellees' petition that we modify our opinion requesting the presence of the Attorney General's Office and the Oklahoma Appellate Public Defender's Office is denied.

Third, the Petition for Rehearing asks that the cases of Bunton v. Cowley, No. 90-6316 (10th Cir. 1991), and Hacker v. Saffle, No. 91-6042 (10th Cir. 1991), not be consolidated with this case upon remand because venue for those cases is properly lodged in the Western District of Oklahoma rather than in the Northern District of Oklahoma. That request is well taken, and it will be granted. The opinion previously entered in this case is amended to delete the requirement that Bunton v. Cowley and Hacker v. Saffle be consolidated with this case. Those two cases have been remanded to the Western District of Oklahoma for further proceedings in accordance with the opinion previously entered in this case. It is our expectation that the Western District of Oklahoma will coordinate its review of the Bunton and Hacker petitions (and any other cases pending in that court raising similar issues) so as to minimize the duplication of efforts to be undertaken by the Northern District of Oklahoma in its review of this case on remand. The chief judges of the Northern, Eastern and Western Districts of Oklahoma are encouraged to consider the use of interdistrict designation of judges and other docket management techniques to coordinate the efficient and orderly resolution of habeas cases and § 1983 cases pending in their respective districts that raise similar issues.

We do, however, reaffirm the order in our previous opinion that the Northern District of Oklahoma consolidate, to the extent it is practical and reasonable to do so, for purposes of the hearing on remand any other habeas corpus cases presently pending in that court that raise a constitutional attack upon the delay in obtaining legal services from the Oklahoma Appellate Public Defender's Office for a direct criminal appeal to the Oklahoma Court of Criminal Appeals. The petitioners' claims here could well affect and overlap other habeas petitions pending before the Northern District of Oklahoma which raise the same issue. In the exercise of our supervisory responsibilities, we deem it more efficient if such cases can be consolidated, to the extent deemed practical and reasonable by that court, for the purposes of the hearing ordered on remand.

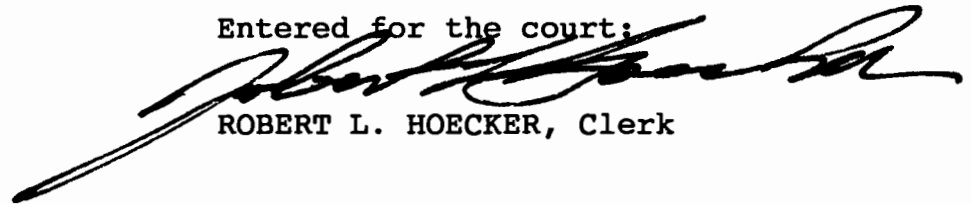
It is the obligation of this court and the federal district courts to insure that the constitutional rights of indigent habeas petitioners are not violated by the denial, individually or systematically, of effective counsel on their first direct criminal appeals. Thus, we reaffirm our previous opinion that such allegations be investigated promptly and comprehensively and that the district court enter appropriate relief consistent with its findings after such a hearing. Except as so modified, our prior opinion is reaffirmed in all particulars.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service on the court having requested that the court be polled on

rehearing en banc, Rule 35, Federal Rules of Appellate Procedure,
the suggestion for rehearing en banc is denied.

The mandate shall issue forthwith.

Entered for the court:

A handwritten signature in black ink, appearing to read "Robert L. Hoecker", is written over the typed name. The signature is fluid and cursive, with a long horizontal stroke extending to the left.

ROBERT L. HOECKER, Clerk